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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 401

UNITED STATES OF AMERICA for the Use of H. W. Moseley, d/b/a MOSELEY PLUMBING AND HEATING COMPANY,
Petitioner,
versus
ELECTRONIC & MISSILE FACILITIES, INC. (Formerly Five Boro Construction Corporation), and CONTINENTAL CASUALTY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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To the United States Court of Appeals for the Fifth Circuit.

Petitioner, United States of America for the Use of H. W. Moseley, d/b/a Moseley Plumbing and Heating Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 11, 1962.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit with the dissenting opinion of Judge Rives has not yet been reported in the Federal Reporter, but appears

in the transcript of the record at pages 208-222. A copy of said opinions is appended to this petition at page 37.

The opinion of the District Court is contained in the record, pages 196-201.

JURISDICTION.

The opinion of the Court of Appeals for the Fifth Circuit was filed on July 11, 1962, and judgment was entered on the same date. There has been no motion for or order respecting a rehearing and no other proceedings have been had except the entry of an order, pursuant to motion by petitioner, staying the mandate of the Court of Appeals for the Fifth Circuit for a period of sixty days from July 26, 1962. The jurisdiction of this court in invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) The primary question presented by this petition is whether, in a suit under the Miller Act (40 U. S. C. 270 b) against a prime contractor and its surety by an unpaid subcontractor, the prime contractor and surety are entitled to a stay of such Miller Act suit to have the claim of the subcontractor determined by arbitration under provisions of the subcontract, or whether, on the other hand, such unpaid subcontractor is entitled to prosecute said action to final execution and judgment.

Respondent, Electronic & Missile Facilities, Inc. (formerly Five Boro Construction Corporation) was the prime contractor and respondent Continental Casualty Company was its surety, in contracts with the United States of America for the construction of Nike-Hercules facilities, one contract being for construction of such facilities at Robins Air Force Base Defense Area, Georgia and the

other for facilities at Turner Air Force Base Defense Area, Georgia, both of which Air Bases are located within the Middle District of Georgia. The use petitioner, H. W. Moseley, d/b/a Moseley Plumbing and Heating Company, entered into written subcontracts with the prime contractor under which Moseley was to do the plumbing and heating work in the construction of each of said facilities. After the work had been completed Moseley filed this suit in the District Court for the Middle District of Georgia under the Miller Act seeking to recover various sums to which he contended he was entitled and which were unpaid. The suit sought an injunction against the prime contractor's proceeding with an arbitration proceeding which had been commenced by it against Moseley in the City of New York under the purported authority of provisions of the subcontract. That defendant was temporarily restrained from proceeding with the purported arbitration. The defendants filed a motion to dismiss, or in lieu thereof to stay, the suit until an arbitration should be had in accordance with the provisions of the contracts. The District Court after a hearing determined the question adversely to the defendants, respondents herein, holding that the provisions of the United States Arbitration Act cannot be invoked in a Miller Act case so as to stay the proceedings in such case and compel unwilling arbitration, and accordingly denied the alternative motions to dismiss and to stay the proceeding and continued the temporary restraining order in force. On appeal the United States Court of Appeals for the Fifth Circuit in a two to one decision, reversed the judgment of the District Court and held, with one Judge dissenting, that the provisions of the contract with reference to arbitration were valid and enforceable and the defendants were entitled to a stay of the Miller Act suit until arbitration had been had. The question thus presented is whether, as held by the majority of the Court of Appeals for the Fifth Circuit, an

unpaid subcontractor, in spite of the explicit provision of the Miller Act that he "shall have the right to sue . . . and to prosecute said action to final execution and judgment for the sum or sums justly due him," must nevertheless have his suit stayed and submit his claim instead to arbitrators for determination where he has signed a subcontract purporting to so provide, or whether, on the other hand, as held by the District Court and the dissenting opinion of the Court of Appeals, the provisions of the United States Arbitration Act for compelling arbitration are inapplicable to suits under the Miller Act, adopted ten years after the Arbitration Act, for the reason that the explicit provision that persons occupying the position of an unpaid subcontractor "shall have the right to sue . . . and to prosecute said action to final execution and judgment" render unenforceable a provision inserted in a subcontract by a prime contractor purporting to take away those rights so explicitly stated by Congress.

(2) The second question presented is whether the subcontracts between Moseley and the prime contractor for the plumbing and heating work at these Nike-Hercules facilities were contracts "evidencing a transaction involving commerce"; within the meaning of the United States Arbitration Act. This question would be reached only in the event the primary question above stated should be decided adversely to petitioner's contention. The District Judge found it unnecessary to determine this question, stating "assuming but not deciding that the subcontract here sued upon comes within the ambit of Sec. 2 of the Arbitration Act" (R. 197), while the Court of Appeals for the Fifth Circuit held the Arbitration Act was applicable to these contracts (R. 210).

STATUTES INVOLVED.

The questions presented involve Secs. 1, 2 and 3 of the United States Arbitration Act and Sec. 2 of the Miller Act.

The Sections of the United States Arbitration Act here involved are set out in 9 U. S. C. 1, 2 and 3. Because of their length they are set out in full in the Appendix to this petition.

Sec. 2 of the Miller Act is set out in Act August 24, 1935, c. 642, Sec. 2, 49 Stat. 794, as amended by Act August 4, 1959, pub. L. 86-135, Sec. 1, 73 Stat. 279, and is now set out in 40 U. S. C. 270b as follows:

> "(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: **Provided, however,** That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made.

stating with a substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere; irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit."

STATEMENT OF CASE.

The facts as to the primary question are not in dispute because this question was decided by the District Court and the Court of Appeals for the Fifth Circuit and will be decided by this Court upon the basis of the facts alleged in the complaint and the law applicable thereto.

Suit was brought by petitioner under the provisions of the Miller Act to recover sums due and unpaid to him as a subcontractor who had furnished labor and material in the prosecution of the work provided for in the contract between the defendant contractor and the United States

of America. The complaint was brought in six counts. Counts I and II seek recovery directly on the contracts, count I relating to the contract for the work at Robins Air Force Base Defense Area near Warner Robins, Georgia, and count II relating to the contract for work at Turner Air Force Base Defense Area, near Albany, Georgia. The complaint attached copies of the subcontracts, which were on printed forms with blanks filled in by typewriter as to the name and address of the subcontractor, identification of the prime contract, the contract amount and the description of the work covered by the subcontract. The printed subcontract forms covered 13 pages, and thus were in fine print as compared to their appearance in the record, where the subcontract covering the work at Turner Air Force Base Defense Area covers 44 pages, being set out at pages 23-66. The contract for the work at Warner Robins Air Force Base Defense Area is identical except for description of the work and the contract amount, and is set out in the record, pages 67-110. Count I alleged the defendant was indebted to the plaintiff in the sum of $71,900.57 on the Warner Robins Air Force Base Defense Area contract, and count II alleged an indebtedness of $44,970.10 on the Turner Air Force Defense Area contract. It was alleged that paragraph 26 of the subcontract purports to provide that any controversy or claim arising out of said contract shall be determined by arbitration, but it was alleged that said provision for arbitration is void and unenforceable because (a) it is contrary to public policy in that it is in direct violation of the express provisions of the Miller Act. (b) it is an attempt to oust the Federal District Court of jurisdiction and to deprive petitioner of benefits intended by the Miller Act. . . . (c) it is unreasonable and arbitrary and its enforcement would work a hardship upon petitioner to the extent of depriving him of the rights intended to be granted by the Miller Act in that it would require presentation of evidence before a foreign

forum many hundreds of miles removed from the place where the work was performed and where petitioner's witnesses would be available and petitioner would not be able to compel the presence of witnesses at such distant place, as more fully set out in the record, pages 6-7. It was alleged that in spite of the invalidity of said arbitration provision the defendant contractor had filed in the Supreme Court of the State of New York, County of New York, a purported arbitration proceeding, had procured an order setting a hearing for February 28, 1961, and had purported to serve the same upon petitioner by mail, and unless temporarily restrained and enjoined said defendant would proceed with said purported arbitration to the irreparable injury and damage of petitioner (R. 7).

It was further alleged (R. 7) that petitioner could not adequately present the facts relating to his claim against defendants in said arbitration proceedings because compulsory process to require the presence of witnesses from the Middle District of Georgia in the Supreme Court of the State of New York, more than 700 miles from the Middle District of Georgia, would not be available.

It was further alleged (R. 8) that the Miller Act requires that a suit be commenced within one year after the last labor was performed or material was supplied and all of petitioner's rights under said act would be lost if he participated in arbitration proceedings and the same were not concluded within one year from the date when the last work was performed or material supplied by petitioner. Each of these counts prayed that the defendant contractor be temporarily and permanently enjoined from proceeding with the purported arbitration in New York.

Count III, with respect to the Warner Robins Air Force Base Defense Area contract, and count IV, with respect to the Turner Air Force Base Defense Area contract, seek to rescind the contracts because of fraud on the part of

the defendant prime contractor and to recover in quantum meruit $95,678.79 and $96,335.88, respectively, as well as $20,000.00 on each count as attorneys' fees and other expenses of litigation to which petitioner claims to be entitled because of the bad faith, misconduct, fraud, malice and oppression on the part of the defendant prime contractor alleged in those counts. These counts adopted all of the pertinent allegations of the previous counts with respect to the pendency of the purported arbitration proceedings in New York, the contentions of petitioner as to the invalidity of the provisions of the contract relating to arbitration, the inability of petitioner to adequately present the facts relating to his claim in such arbitration proceedings, and the necessity for said proceedings to be enjoined, and likewise prayed for a temporary and permanent injunction against the defendant contractor's proceeding with such arbitration.

The fraud which petitioner claimed entitled him to rescind the contract was that the defendant prime contractor "has been guilty of the grossest kind of misconduct, fraud, malice and oppression in its entire dealings with Moseley Plumbing and Heating Company in connection with said work and said contract in that it conceived and executed a fraudulent and illegal scheme, plan and design to perpetrate a fraud upon Moseley Plumbing and Heating Company, and other subcontractors as well, by causing said Moseley, as well as other subcontractors, to furnish materials and labor for said project with the intention on the part of said defendant of obtaining a large portion of said work and materials without paying therefor or by browbeating Moseley and said other subcontractors into accepting much less than their real value, which said plan, scheme and design was conceived, executed and perpetuated upon Moseley in the following particulars: . . ." (R. 12).

Then follow the particulars as to how said fraudulent scheme was carried into effect, set out in the various subparagraphs (R. 12-16) which may be summarized as follows:

(a) The defendant represented it was a general contractor and that the work to be done by Moseley was that spelled out in the typewritten part of the printed subcontract, whereas in truth that defendant had no intention of performing the proper function of a general contractor by doing substantial parts of the work itself and supervising and coordinating the work of subcontractors but instead intended to and did subcontract substantially all of the work and itself had no employees except for a project superintendent and a handful of laborers.

(b) Pursuant to that plan of operation said defendant fraudulently and with malice inserted into its printed subcontract form provisions purporting to authorize it to require Moseley or other subcontractors to do any work whatever, regardless of whether it bore any proper relation to the work called for in the main typewritten portion of the subcontract, which provisions were inserted with the specific malicious intent of using them to give color to and to act as a specious cover for directives to do work in no way connected with the plumbing and heating called for by Moseley's subcontract and with the intention of avoiding payment under the false and fraudulent contention that the work was covered by such subcontract, and if it could not get Moseley to accept the work as part of the subcontract to get him to accept a greatly reduced amount of compensation in order to avoid litigation and to obtain money with which to pay his creditors.

(c) Said defendant did issue numerous directives to Moseley to do work which the defendant knew was not covered by the contract but defendant in bad faith and maliciously as a part of said scheme contended it was so

covered, and defendant's bad faith in this connection was so great that it discharged from its employ its project superintendent who attempted to be honest and agreed with Moseley and other subcontractors that work called for by such directives was not covered by the subcontract and that he should receive additional compensation therefor.

(d) As a part of said scheme the defendant issued a large number of such directives so as to greatly increase the amount of work to be done by Moseley and increase his capital outlay and, at the same time, withheld payments to which Moseley was entitled, with the express purpose and intent of producing financial pressure upon Moseley with the intention of forcing him to settle with them for a price far below the real value of such additional work.

(e) This scheme of producing financial pressure on Moseley was a general scheme which said defendant applied to all subcontractors in order to squeeze profits for itself from the financial sacrifices it was attempting to cause said subcontractors to make, which plan was carried to complete fruition both with respect to Moseley and every other subcontractor, practically all, if not all of the subcontractors becoming insolvent by the time the project was completed.

(f) As a further part of said scheme said defendant carried out a practice of making back charges against each of the subcontractors and Moseley by which it billed them for enormous and outrageous charges for work allegedly covered by the subcontract and allegedly done by said defendant, when the defendant in truth knew that the work for which the back charges were made was not a part of the subcontract and the charges were maliciously made in an effort to reduce the compensation to which Moseley was entitled, and, for various work not

covered by any subcontract but plainly required to be done by said prime contractor, that defendant allegedly prorated the cost between each of the subcontractors but in fact actually charged the total cost of such work to each of such subcontractors, and in addition the defendant attempted to charge Moseley the cost of work performed by other subcontractors clearly covered by their subcontracts and not covered by Moseley's subcontract.

(g) The provisions of the subcontract purporting to require arbitration of any claim or dispute in New York were maliciously inserted in furtherance of the express purpose of the defendant to obtain work and materials without paying therefor and with the intention on the part of the defendant of causing a purported arbitration in New York, at least 700 miles from the Middle District of Georgia, where it knew and intended that Moseley and other subcontractors could not properly appear and present their evidence and claims because of the impossibility of compelling the attendance of witnesses at such great distance and because of being financially unable to do so because of the financial stress intentionally produced by the defendant, all with the intention of having allowed in favor of the defendant in such arbitration proceeding all of the false and fraudulent claims of defendant that Moseley was not entitled to compensation for extra work done under directives from that defendant and of having allowed their false and fraudulent back charges and with the intention of defeating the right of Moseley and other subcontractors to have their legitimate claims litigated in the United States Court for the Middle District of Georgia as expressly provided by the terms of the Miller Act.

Counts V and VI sought recovery for work done under the contracts at Warner Robins Air Force Base Defense Area and Turner Air Force Base Defense Area respectively under the alternative theory that, even if petitioner

could not show full performance of all terms of the subcontract so as to be entitled to recovery on the contracts themselves under counts I and II, and even if petitioner should be unable to establish a right to rescind the contracts as sought in counts III and IV, petitioner was nevertheless entitled to recovery of the reasonable value of the labor and materials furnished by petitioner and retained by the defendant, less payments made by defendant and any legitimate damages which may have been suffered by the defendant. These counts adopted all of the same allegations as to the purported arbitration proceedings, the invalidity of the contract provisions with respect to arbitration, the inability of Moseley to properly present his claims in the arbitration proceedings, and the necessity of enjoining such proceedings.

Upon filing and presentation of the verified complaint a temporary restraining order was entered restraining the defendant prime contractor from further proceedings in connection with his application for arbitration in New York, and thereafter the restraining order was continued in effect by consent of all parties.

The defendant prime contractor filed its motion to dismiss, or in lieu thereof, to stay the proceedings until an arbitration should be had in New York in accordance with the terms of the subcontract. Upon the hearing of this motion there was introduced an affidavit of Nathan Cohen, Executive Vice President of the defendant prime contractor, to the effect that the Nike installations at the Warner Robins Air Force Base Defense Area and the Turner Air Force Base Defense Area are four of approximately seven hundred different bases for anti-aircraft defense tied together by a system called semi-automatic ground environment system (SAGE) with headquarters in Colorado, consisting of bases stretching across Canada, Texas towers at sea, radar stations and communication

centers along both seaboards of the United States and BOMARC and Nike stations scattered throughout the United States, that the Nike stations erected at Warner Robins Air Force Base Defense Area and Turner Air Force Base Defense Area are designed not only to protect the Strategic Air Command bomber bases at those locations but to intercept enemy planes coming from abroad heading towards other installations in the United States, and that they are an integral part of an intercontinental defense system and were constructed to enlarge the existing facilities for such systems.

There was introduced also the deposition of Major John W. Poston, a witness for the petitioner, who was operations officer of an artillery missile battalion charged with the operation of the facilities constructed at the Warner Robins Air Force Base Defense Area. His testimony showed that the areas where these facilities were constructed were previously open land and forest with no improvements whatever, located about 15 to 17 miles from Warner Robins Air Force Base Defense Area and Turner Air Force Base Defense Area, respectively, that there were at these locations after completion of construction no facilities for operation of aircraft, but the primary purpose and functions of the installations was to launch missiles that would intercept enemy planes to defend the country in the event of hostile attack.

It was clear from Major Poston's testimony that even after full completion of the construction contract by the prime contractor the facilities had not, and could not, become a part of the defense system detailed in his testimony and in the affidavit of Cohen, but that it was necessary for the Army then to install a tremendous amount of equipment, such as cabling systems, computers, launchers, radar controls, antennas, and assembling equipment, and it had to bring in missile components and build them into

missiles and place them on the launchers which the Army had installed, develop security systems, set up systems for housing, feeding and administering troops, move in troops and then tie the facilities in by communications to other parts of the defense system (R. 146-147). He testified (R. 171-172) that after full completion of the contract by the prime contractor, it was necessary for the Army to do $200,000.00 worth of labor and install $7,000,000.00 worth of equipment at each of two different locations at Warner Robins Air Force Base Defense Area and two locations at Turner Air Force Base Defense Area. Thus the total labor left to be done by the Army was some $800,000.00 worth, and the total cost of equipment which had to be installed was approximately $28,000,000.00, all of which was necessary in order for the facilities, after completion of the prime contractor's construction, to become a part of the defense system.

The only evidence related to the nature of the construction. The primary question as to the enforceability of the arbitration provisions of the contract, and the right of the defendant prime contractor to a stay of the Miller Act suit was determined as a question of law on the basis of the allegations in the complaint.

It is significant that the provisions of the subcontract with respect to arbitration do not require that there be any dispute between the parties. It purports to provide even that any **claim** under the contract shall be submitted to arbitration. That provision is: "Arbitration: Twenty-Sixth: (a) Any controversy or claim arising out of or relating to this agreement or the breach thereof, provision for the determination of which is not made elsewhere in this agreement, shall be settled by arbitration in the Borough of Manhattan, City and State of New York in accordance with the Civil Practice Act of the State of New York. The Contractor and the Subcontractor agree

that any application by either side for the appointment of an arbitrator in accordance with this paragraph shall be made in the Supreme Court of the State of New York, County of New York, and that said Court shall have jurisdiction over every party in connection with any such arbitration. The cost of such arbitration shall be borne equally".

Although the majority opinion of the Court of Appeals for the Fifth Circuit contains the statement (R. 213): "The appellee has not even attempted to demonstrate how or why he would be prejudiced by having this dispute settled by arbitration rather than in the federal courts"; the case was decided both in the District Court and in the Court of Appeals on the basis of the allegations of the complaint, and thus there is absolutely no dispute in the record of the allegation in paragraph 15 of count I (R. 7), which is adopted in each of the other counts, that "petitioner could not adequately present the facts relating to his claim against defendants in said arbitration proceedings because compulsory process to require the presence of witnesses from the Middle District of Georgia in the Supreme Court of the State of New York, more than 700 miles from the Middle District of Georgia would not be available". Likewise there is in the record no dispute with respect to the allegations of subparagraph (g) of paragraph 2 of count III (R. 16), adopted in counts IV, V and VI, that: "The provisions in said subcontract purporting to require an arbitration of any claim or dispute in the State of New York was maliciously inserted in said contract in furtherance of the express purpose of defendant to obtain work and materials without paying therefor with the intention on the part of said defendant of causing a purported arbitration of all such claims in the State of New York at least 700 miles distant from the Middle District of Georgia where it knew and intended that Moseley and other subcontractors could not properly appear and

present their evidence and claims because of the impossibility of compelling the attendance of witnesses at so great distance and because of being unable financially to do so because of the financial stress intentionally produced by defendant, all with the intention of having allowed in favor of said defendant in such proceeding all of the false and fraudulent claims of defendant that extra work done by Moseley and other subcontractors was covered by their subcontracts when in fact it was not, and of having allowed their false and fraudulent back charges against Moseley and other such subcontractors as hereinbefore alleged, all with the intention of defeating the right of Moseley and other subcontractors to have its legitimate claims litigated in this Honorable Court as expressly provided by the terms of the Miller Act."

The basis for Federal jurisdiction in the court of first instance is the provision of the Miller Act, set out in 40 U. S. C. 270b (b) that

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit. . . ."

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been, but should be, settled by this court.

The Miller Act applies to every contract exceeding $2,000.00 in amount for the construction, alteration, or repair of any public building or public work of the United States. (40 U. S. C. 270 a). There are thousands

of such contracts executed every year and literally billions of dollars of public funds are spent each year for such construction. In every large construction contract the prime contractor enters into subcontracts with many smaller contractors, and in turn each of these smaller subcontractors purchases materials from a large number of material men and has other subcontracts of his own as well as numerous persons engaged by him to furnish labor. Thus for each prime contract there are hundreds and often thousands of persons furnishing labor or material and who are thus within the class for whose benefit and protection payment bonds are required under the Miller Act.

Local subcontractors and material men, with the assurance given by the Miller Act, that, if they are not paid for labor and materials they have furnished, they have a right to sue on the bond of the prime contractor and "to prosecute said action to final execution and judgment", and that the suit "shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere", have definite assurance that they will be paid for the labor and material which they furnish, and that if they are not paid voluntarily by the contractor or subcontractor by whom employed they have a right to sue a surety which they know is solvent and from whom their legitimate bills may be collected, and that such suit, regardless of amount, may be prosecuted in the United States District Court in the district where the work was done or materials were furnished.

This wise provision of the Miller Act enables the public work to go forward speedily. There is no reluctance on the part of laborers, material men and subcontractors to furnish labor and material to a prime contractor in carrying out a contract with the United States.

On the other hand, if these small local laborers, material men and subcontractors did not have such assurance, they would be reluctant to furnish this labor and material for the public work to a large prime contractor unknown to them.

The number of subcontractors and material men willing to contract with a prime contractor without this protection would be greatly reduced, and the cost at which the prime contractor could do the work would therefore be increased, thus causing his bid, and the cost to the public, to be correspondingly increased.

The lack of such protection would enable unscrupulous prime contractors to cheat and swindle local subcontractors out of amounts justly earned by them, by the insertion in the fine print of voluminous subcontracts of burdensome agreements by which they could defeat payment altogether or reduce their payments to a small fraction of what they legitimately owe by making it so difficult and expensive for the local subcontractor to obtain payment that he will settle his claim for a small fraction of its real value. **That is exactly what has happened in this case**, according to the allegations of the complaint.

This very grave consideration was pointed out by dissenting Judge Rives when he said (R. 219): "The prime contractor is in peculiarly favorable position to impose upon those who would enter into subcontracts with him burdensome agreements as to arbitration. The number of subcontractors from which the prime contractor may choose is limited only by the scope of the industry, while would-be subcontractors must seek the nod of a single prime contractor, who is in that respect a complete monopolist."

On the same page of the record, the dissenting Judge quotes language of the District Judge that: "The instant

case strikingly demonstrates the purpose of Congress in thus providing an exclusive venue, and, it is believed, an exclusive forum for the resolution of Miller Act disputes. The inherent inconvenience and injustice of Moseley's being forced to transport himself, his records, and his witnesses from the scene of the activities under investigation to a point so distant as New York City is from Macon, Georgia, is readily apparent."

This Court itself pointed out in **MacEvoy Co. v. United States**, hereinafter cited, that the changes made by the Miller Act in the Heard Act which it repealed and superseded were made for the purpose of making it easier for unpaid creditors to realize the benefits of the bond and that one of the purposes of the Miller Act was to avoid inconveniences and delays and to avoid the necessity for unpaid laborers, subcontractors and material men to settle meritorious claims for less than the full amount.

The primary question as to whether a suit by an unpaid material man or subcontractor under the Miller Act may be stayed to await the outcome of enforced unwilling arbitration in accordance with the terms of a subcontract purporting to require the same is one of first impression.

Although there are three other cases, two from the Fourth Circuit, and one from the Sixth Circuit, indicating or holding that arbitration is allowable in a Miller Act suit, the contention here urged was not presented to or considered by the court in either of those cases. This fact was pointed out by the District Judge (R. 200), was recognized by counsel for respondents in their arguments before the Court of Appeals for the Fifth Circuit, and is pointed out by the majority opinion of the Court of Appeals for the Fifth Circuit (R. 215).

The first of these cases, **Agostini Bros. Building Corporation v. United States**, 4 Cir., 142 Fed. 2d 854, without

considering or deciding the question here presented, was decided upon the basis that the United States Arbitration Act was applicable to all contracts containing an agreement to arbitrate, and not just those dealt with in Section 2 of the Act, namely, maritime transactions and contracts evidencing a transaction involving commerce. This view of that court was the basis for the decision authorizing a stay for arbitration. Since that decision in 1944, this view, and the entire basis for that decision, has been rejected by this Court in a decision holding directly to the contrary. In **Bernhardt v. Polygraphic Co.**, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199, this Court specifically held that the stay authorized by Section 3 was applicable only to agreements for arbitration contained in the kinds of contracts specified in Section 2, namely, maritime transactions and contracts evidencing transactions involving commerce.

The next case, **United States v. Bregman Construction Corporation**, 6 Cir., 256 Fed. 2d 851, did not grant a stay although the Court, at page 853, cited the Agostini Bros. case, supra, as authority for a statement that in a proper situation the Arbitration Act applies in proceedings brought under the Miller Act.

The other case, **United States v. Al Con Development Corporation**, 4 Cir., 271 Fed. 2d 904, was decided upon the basis of concession by the defendants that the provisions of the Arbitration Act "are not applicable here and that, if the lower court has the power to stay proceedings, pending arbitration, it must find that authority in the law of the State of Virginia" (p. 906). That court then proceeded to conclude that the agreement was enforceable under the state law because the agreement provided that the decision of the arbitrators "shall be a condition precedent to any right of legal action" (p. 906).

Thus the instant decision is the only one in which any court has considered the effect of the public policy embodied in the Miller Act upon private agreements between a prime contractor and a subcontractor that any claim or dispute shall be settled by arbitration at a place many hundreds of miles from the place where the work was performed, in spite of the specific language of the Miller Act that any person who has furnished labor or material and has not been paid "shall have the right to sue . . . and to prosecute said action to final execution and judgment . . . ."

The only case we have found in which any court has considered the validity and enforceability of contract provisions found to be at variance with the public policy declared by the Miller Act is a District Court decision in **United States v. Holloway Company**, 126 Fed. Sup. 347, where the court said (p. 348):

> "This court is of the opinion that the provisions in the contracts between the plaintiffs and the Holloway Company, to the effect no payment is to be due the subcontractor until final payment has been made by the Government to the prime contractor are contrary to the public policy to be gleaned by a reading of the Miller Act. Title 40, U. S. C. A., Section 270a et seq. A study of this Act reveals Congress had in mind providing an efficient and speedy method whereby those supplying labor and materials to a person having a contract with the Government of the United States for the erection of public improvements could in the event of proper performance of the contract on their part recover by an action on a payment bond to be furnished by the prime contractor and a corporate surety, the amounts due and owing said subcontractor at the completion of the latter's performance. Reasonable periods were inserted in the

Miller Act within which an action to recover under a statutory bond could be had: . . . . Any contractual deviations from the objectives of the Miller Act which cause or tend to cause unwarranted delay to good faith subcontractors are against the public policy of the Act and should not afford an escape to those prime contractors who have secured insertion of the above covenants in contracts between them and subcontractors."

2. **The decision of this important question of federal law by the Court of Appeals for the Fifth Circuit is in conflict with applicable decisions of this Court.**

(a) It is in conflict with **MacEvoy Company v. United States**, 1944, 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163, where, at pages 105-106 of 322 U. S., this Court held:

"The Heard Act, which was the predecessor of the Miller Act, required Government contractors to execute penal bonds for the benefit of 'all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract.' We consistently applied a liberal construction to that statute, noting that it was remedial in nature and that it clearly evidenced 'the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work' . . .

"**The Miller Act**, while it repealed the Heard Act, reinstated its basic provisions and **was designed primarily to eliminate certain procedural limitations on its beneficiaries.** There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; **the intent rather was to remove the procedural difficulties** found to exist under the earlier measure and thereby **make it easier for unpaid creditors to realize the benefits of the bond.**" (Emphasis supplied.)

The Court, in a footnote, pages 105-106, says:

> "Under the Heard Act, a single bond was required to protect both the Government and the suppliers of labor and materials. The Government was given the sole right to sue on the bond for six months after completion of the work and final settlement. Other claimants could sue only thereafter and had to join in a single action. **Serious inconveniences and delays resulted. The claimants, often in need of immediate funds, were compelled to settle meritorious claims for less than the full amount. The Miller Act was designed to meet these difficulties** by requiring that the prime contractor execute two bonds—a performance bond to protect the Government and a payment bond to protect the creditors. Creditors can sue on the latter bond without waiting for the Government and even without waiting for completion of the project. Each creditor may sue separately ninety days after the labor is completely performed or materials fully supplied." (Emphasis supplied.)

The majority opinion of the Court of Appeals for the Fifth Circuit permits a result diametrically opposed to the specific intent of Congress as declared by this Court.

It is alleged in this complaint that the defendant contractor conceived and executed a fraudulent and illegal scheme, plan and design to perpetrate a fraud upon Moseley "by causing said Moseley . . . to furnish materials and labor . . . with the intention on the part of said defendant of obtaining a large portion of said work and materials without paying therefor or by browbeating Moseley . . . into accepting much less than their real value . . ." (R. 12), and that one of the means by which said contractor carried this plan, scheme and design into effect was by the insertion in the printed subcon-

tract of the provisions purporting to require arbitration of any claim or dispute in New York (R. 16).

In other words, petitioner alleged that the prime contractor conceived a fraudulent scheme to accomplish precisely what this Court said in the above case that the changes which the Miller Act made in the Heard Act were intended by Congress to prevent.

Although that case did not deal with arbitration provision, the principle there enunciated requires a holding contrary to the majority opinion of the Court of Appeals for the Fifth Circuit.

(b) The Court of Appeals decision is in conflict with **United States v. Carter,** 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776, where this Court held:

> "The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate **the Congressional intent to protect those whose labor and materials go into public projects** . . . (p. 216).
>
> "The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of nonfederal buildings. **The essence of its policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material** . . ." (pp. 216-217) (Emphasis supplied).

(c) The Court of Appeals holding that "the appellee will not be deprived of any substantial right if it is forced to comply with its voluntarily assumed obligation to arbitrate in New York City" (R. 211), is in direct conflict

with a decision of this Court pointing out the very substantial differences in the substantive rights of the parties which may result from proceeding by arbitration rather than in the United States District Court in the District in which the work was performed as the statute provides, where this Court said in **Bernhardt v. Polygraphic Company**, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (p. 203):

> "For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action . . .. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate results. Arbitration carries no right to trial by jury that is guaranteed . . . by the Seventh Amendment . . .. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in **Wilko v. Swan**, 346 U. S. 427, 435-438, 98 L. Ed. 168, 175-177, 74 S. Ct. 182."

(d) The decision of the Court of Appeals is likewise in conflict with the applicable decision of this Court in **Wilko v. Swan**, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168.

In the Wilko case the Court of Appeals for the Second Circuit had held in **Wilko v. Swan**, 201 Fed. 2d 439, at p. 444:

> "We think that the remedy a statute provides for violation of the statutory right it created may be sought not only in any 'court of competent jurisdiction' but also in any other competent tribunal such as arbitration . . ."

This Court on certiorari reversed that philosophy and held to the opposite that the remedy a statute provides for violation of the statutory right it created is part and parcel of the right itself and the remedy may not be waived and an agreement to arbitrate substituted for it. This Court therefore held void an agreement to arbitrate any controversy which was contained in a margin agreement for the purchase of securities. This Court pointed out that the provisions of the Securities Act of 1933 were designed to protect investors, and require dealers, etc., to make full and fair disclosure of the character of securities sold and to prevent fraud in their sale, and then said, 346 U. S., p. 431:

> "To effectuate this policy, Sec. 12 (2) created a special right to recover for misrepresentation which differs substantially from the common law action . . ."

The Court then adopts the argument of the petitioner that "the purpose of Congress was to assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act", and "that arbitration lacks the certainty of a suit at law under the Act to enforce his rights."

The Court says (p. 435) "and we think the right to select the judicial forum is the kind of 'provision' that cannot be waived under Sec. 14 of the Securities Act. That conclusion is reached for the reasons set out above in the statement of petitioner's contentions on this review . . .

"When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary."

The language of this Court in that case is even more applicable to the Miller Act. The Miller Act gives an unpaid subcontractor an absolute right, not only to sue, but to "prosecute said action to final execution and judgment." Instead of a wide choice of the forum in which to bring such suit, it is specifically provided in the Miller Act that "every suit instituted under this section **shall be brought** . . . in the United States District Court for any District in which the contract was to be performed and executed **and not elsewhere** . . ."

Rather than surrendering one of the advantages which the Act gives him, as was said by this Court of the security buyer in the Wilko case, a subcontractor purporting to agree to settle any claim by arbitration surrenders **every** right which the Miller Act gives him, and completely nullifies its intended benefits.

(c) The decision of the Court of Appeals is in conflict with the applicable decision of this Court in **Brooklyn Savings Bank v. O'Neil**, 324 U. S. 697, 65 S. Ct. 895, 89 L. Ed. 1296.

In that case this Court held void an agreement by an employee to release the employer from liability for liquidated damages for failure to pay the minimum wages provided by the Fair Labor Standards Act, rejecting a contention that Congress did not intend for such waiver of rights to be void because it had in other acts specifically provided that waiver of rights there granted would be void, but had not so provided in this Act. In that connection this Court said (p. 713): "absence of such provisions, however, has not prevented the courts from invalidating waivers where the legislative policy would be thwarted by permitting such contracts. The decision in the instant case is based on the legislative policy behind this enactment. . . ."

The rule, supported by numerous decisions cited by this Court, which was applied by this Court to the Fair Labor Standards Act is just as applicable to the Miller Act, where the court said: "It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy . . . Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate" (p. 704).

That decision is clearly appl able to the provisions of the Miller Act giving an unpaid subcontractor the right to sue and to prosecute the action to final execution and judgment, because it was clearly held by this Court in **MacEvoy v. United States**, supra, that the Miller Act clearly evidenced the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work and that by the changes from the Heard Act which were made by the Miller Act the intent of Congress was to remove the procedural difficulties found to exist under the earlier measure and thereby **make it easier for unpaid creditors to realize the benefits of the bond.**" (Emphasis supplied.)

(f) The decision of the Court of Appeals is also in conflict with the applicable decision of this court in **Boyd v. Grand Trunk Western Railroad Co.**, 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55, which held void an agreement by an injured railroad employee that any suit he brought would be brought in the state where he lived and was injured, where this court said: "The right to select the forum granted in Sec. 6 is a substantial right. It would thwart the express purpose of the Federal Employer's Liability Act to sanction defeat of that right by the device of the bar."

(g) The Court of Appeals decision is likewise in conflict with the applicable decision of this Court in **Pope v. Atlantic Coastline Railroad Company**, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094, which reversed a decision of the Supreme Court of Georgia to the effect that a Court of Equity in that state could restrain a resident of the state from maintaining a suit in a court of a foreign state upon a cause of action arising in Georgia under the Federal Employer's Liability Act, where the foreign suit had for its purpose or necessary effect the obtaining of an inequitable or unconscionable advantage over the defendant. This Court held the right of an injured employee to bring suit in one of the forums provided by the act could not be thus restricted, saying (p. 383): "Congress has deliberately chosen to give petitioner a transitory cause of action; and we have held before, . . . that Sec. 6 displaces the traditional power of a state court to enjoin its citizens on the ground of oppressiveness . . . from suing . . . in the state courts of another state."

All of the above decisions of this Court, firmly and clearly establishing the law to be that a right granted by an act of Congress to a particular class of beneficiaries cannot be waived, where the waiver of the right would thwart the purpose of Congress, are clearly applicable to the provisions of the Miller Act with respect to the right granted unpaid laborers, subcontractors and material men to sue and to prosecute such action to final execution and judgment.

It should be borne in mind that the Arbitration Act, with its provision for a stay of certain types of suits, was enacted in 1925 and had been in effect for ten years when the Miller Act was enacted in 1935 with its specific, unqualified provision that an unpaid subcontractor "shall have the right to sue . . . and to prosecute said action to final execution and judgment".

Thus it is inevitable that Congress, in enacting the Miller Act with these positive provisions, had in mind the provisions of the United States Arbitration Act which, except for the specific provisions of the Miller Act deliberately inserted by Congress, might have permitted a stay of such suits if the contract for the work evidenced a transaction involving commerce.

If Congress had not intended to prevent a stay of such suits, it would not have added the words "and to prosecute said action to final execution and judgment", but would have stopped with the words "shall have the right to sue".

The unqualified right "to prosecute said action to final execution and judgment" completely excludes the possibility of such action being stayed. To sue and to prosecute an action to final execution and judgment is the exact opposite of suing and not prosecuting, but having the suit stayed.

Black's Law Dictionary defines "prosecute" as follows:

> "To follow up; **to carry on** an action or other judicial proceeding; to proceed against a personal criminally. To 'prosecute' an action is **not merely to commence it, but includes following it to an ultimate conclusion** . . ." (Emphasis supplied).

The same authority defines the verb "stay" as follows:

> "To stop, arrest or forbear."

It defines the noun "stay" as follows:

> "A stopping; the act of arresting a judicial proceeding by the order of the court."

Obviously then, if an action is stayed, it is not being prosecuted, it is not being carried on, it is not being followed to an ultimate conclusion.

When Congress provided that an unpaid subcontractor shall have the right to use, and was not content to stop there but added the words "and to prosecute said action to final execution and judgment", the added words, if they do not clearly mean that such a suit shall not be stayed for arbitration or any other purpose, do not mean anything whatever. Surely it cannot be held that Congress added these words for no purpose and with no meaning.

The error of the majority opinion of the Court of Appeals lies in the fact that it stresses the venue provision of the Miller Act as to the District Court in which such suit shall be brought, and ignores altogether these words giving the unqualified right not only to sue but to prosecute the action to final execution and judgment.

3. **The decision in this case is in conflict with the decision of another Court of Appeals on the matter of the Congressional intention with respect to the Miller Act and the applicable principles governing its construction.**

It is in conflict with **United States v. Aetna Casualty & Surety Company**, 2d Cir., 297 Fed. 2d 665, where, in construing the Miller Act, that court said:

> "Every subcontractor and material man not reimbursed for work done under a contract is given an unqualified right to sue on the payment bond . . . (p. 667).
>
> "The primary aim of the Miller Act was **to secure greater protection for the subcontractor.** The major changes were designed to streamline the cumbersome Heard Act machinery and **to facilitate suit** by those supplying labor or materials to the general contractor. It would be ironic indeed to find in those amendments a provision which in today's world would scuttle a major part of the bonding scheme. For that would

be the result of accepting defendant's construction: **with no forum for enforcement, the bond becomes an empty gesture, a stately farce carried out by contractors and sureties, at the public expense, and to the detriment of the very class the Miller Act was designed to protect.** We cannot accept a construction which would lead to such a result. . . .

". . . **the purpose of the Miller Act was clearly to provide a forum for all unpaid subcontractors**" (pp. 668-669).

This clear and strong language of the Court of Appeals for the Second Circuit is in direct conflict with language of the majority opinion in the instant case where the majority said (R. 211):

"The venue provision of the Miller Act, requiring that suit be brought in the district where the contract was performed, was obviously not designed to favor Miller Act plaintiffs. Had Congress meant to make things easy for such plaintiffs, it would have provided them with a choice of forums in which to bring suit."

4. The decision of the Court of Appeals of the Fifth Circuit, in holding that the United States Arbitration Act is applicable to this subcontract, is in conflict with the applicable decision of this court in Murphy v. Reid, 335 U. S. 865, 69 S. Ct. 105, 33 L. Ed. 410, holding that claims under the Fair Labor Standards Act involving solely construction work should be dismissed.

Although this Court in **Mitchell v. C. W. Vollmer and Co.** 349 U. S. 427, 75 S. Ct. 860, 99 L. Ed. 1196 and **Mitchell v. Lublin, McGaughy and Associates,** 358 U. S. 207, 79 S. Ct. 260, 3 L. Ed. 2d 243, held the Fair Labor Standards Act applicable to construction which consists of repair of existing facilities already a part of commerce or an improvement to such facilities by adding other things to an

existing facility which will enable it to operate more effectively, this Court has not extended even that act to construction of the type here involved, entirely new construction, which even after it was fully completed, did not become a part of any existing facility already engaged in commerce, but merely provided the bare building construction which was turned over to the Army which itself then had to perform labor and furnish material at a value of $28,800,000.00 before these Nike-Hercules bases could become a part of an existing defense system.

Furthermore, the Fair Labor Standards Act is much broader in its definition of commerce than is the meaning of that word as used in the Arbitration Act. The Fair Labor Standards Act defines commerce as "trade, commerce, **transportation, transmission or communication** among the several states" (Emphasis supplied).

The Arbitration Act by Sec. 2 applies only to a maritime transaction or "a contract evidencing a **transaction involving commerce.**"

Therefore, under the Arbitration Act, it is not sufficient that the construction have an effect upon commerce, but the construction itself which the contract governs must be "a transaction involving commerce".

Thus, it would not have been sufficient even if the construction after it had been completed had become a part of a facility which was itself engaged in commerce, as would have been sufficient under the Fair Labor Standards Act. The particular transaction, the construction, must **involve commerce.**

CONCLUSION.

The subcontract in this case was not a contract evidencing a transaction involving commerce within the meaning of the Arbitration Act; and therefore that Act

has no application, and respondents were not entitled to a stay of the pending Miller Act suit.

Even, however, if the subcontract should be held to be a contract evidencing a transaction involving commerce, and the Arbitration Act would ordinarily be applicable, it does not apply to any suit brought under the provisions of the Miller Act because of the overriding public policy of that Act as shown by the explicit language that an unpaid subcontractor, laborer or material man "shall have the right to sue . . . and to prosecute said action to final execution and judgment."

The specific question as to whether the right thus explicitly granted by the Miller Act may be entirely nullified by a voluminous subcontract which has hidden within its many pages of fine print a provision purporting to require every claim thereunder to be settled by arbitration at a point many hundreds of miles distant from the place where the work was performed has not been, but should be settled by this court. It is a question of far-reaching importance affecting thousands of subcontractors every year who are owed billions of dollars by prime contractors. This court should decide whether such contractors, after being required by the Miller Act to give a bond for the benefit of unpaid subcontractors, laborers and material men, may entirely nullify the benefit of such bond which Congress intended persons in that class should have, by inserting in its printed subcontract which it requires all of the subcontractors to sign a provision destroying the right to sue on such bond and to prosecute the action to final execution and judgment and substituting arbitration at a distant point as the exclusive remedy provided by the contractor in lieu of the remedy specifically provided in mandatory terms by Congress. If that can be done, then the bond would indeed become an empty gesture and a stately farce.

We respectfully submit that the Court of Appeals for the Fifth Circuit has decided a most important question of Federal law which has not been settled by this court but should be settled and that the decision it has rendered is in conflict with applicable decisions of this court and of another Court of Appeals and that there are important and urgent reasons why this Court should grant this petition for certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX.

OPINION.

In the
United States Court of Appeals
For the Fifth Circuit

No. 19,351

Electronic & Missile Facilities, Inc.,
(formerly Five Boro Construction Corporation)
and Continental Casualty Company,
Appellants,
versus
United States of America for the use of
H. W. Moseley d/b/a Moseley Plumbing
and Heating Company,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(July 11, 1962.)

Before Tuttle, Chief Judge, and Rives and Jones, Circuit Judges.

Tuttle, Chief Judge: The appellant, Electronic & Missile Facilities, Inc., was prime contractor with the United States Government for the construction of Nike Hercules Facilities at Robins Air Force Base and Turner Air Force Base within the Middle District of Georgia. The appellee,

Moseley, was a subcontractor on both projects, and was primarily responsible for the plumbing, heating and air conditioning work. This suit was instituted in the District Court for the Middle District of Georgia by the United States in behalf of the appellee under the provisions of the Miller Act, 40 U. S. C. § 270 a-d. The complaint alleged that approximately $125,000 was due Moseley for work performed under the subcontracts, and that the appellant[1] had breached the subcontracts by refusing to pay. In the alternative, the complaint sought to rescind the contracts for fraud, and to recover for the work performed on a quantum meruit basis. The appellant moved to stay the action on the ground that both subcontracts expressly provided for arbitration of all disputes in New York City.[2] The District Court held that arbitration was contrary to the policy underlying the Miller Act, and the Court therefore enjoined the appellant from proceeding with arbitration in accordance with the provisions of the subcontracts. The appellant brought this appeal pursuant to 28 U. S. C. § 1292 (a) (1). We have concluded that the District Court erred in enjoining arbitration.

The United States Arbitration Act provides that an arbitration provision in any contract "evidencing a transaction involving commerce" shall be "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2. The Arbitration Act further provides that:

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[1] The other appellant, Continental Casualty Company, provided the bond for Electronic & Missile Facilities, Inc. The instant suit was brought on the bond as provided by the Miller Act. Electronic & Missile Facilities, Inc. will be referred to as "the appellant" in this opinion.

[2] The arbitration provisions related to "[a]ny controversy or claim arising out of or relating to this agreement or the breach thereof. . . ."

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing that the applicant for the stay is not in default in proceeding with such arbitration. 9 U. S. C., § 3.

It is clear, first of all, that since the construction of the missile facilities in Georgia required substantial interstate movement of materials and personnel,[3] the contracts here in issue come within the purview of the Arbitration Act as contracts "evidencing a transaction involving commerce." **Metro Industrial Painting Corp., et al. v. Terminal Construction Company, Inc.**, 2 Cir., 287 F. 2d 382. Nevertheless, the District Court held the Arbitration Act inapplicable to the instant case on the theory that a contrary holding would nullify the provisions of the Miller Act requiring

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[3] As the appellant states in its brief:

"Under the facts in the case at bar, appellants are engaged in commerce regardless of which test is applied. It is undisputed in the record that appellant, ELECTRONIC & MISSILE FACILITIES, INC., a New York corporation, contracted with appellee, a Georgia corporation, to do work within the state of Georgia; that appellant sent substantial supervisory personnel across state lines; and received supplies and equipment across state lines. Working on the project were subcontractors from states other than Georgia. Moreover, the facility involved is an integral part of a transcontinental system joined and holding hands with facilities already in commerce in other states and countries by radios and telephone communications, and further joined with numerous other military bases already in commerce from almost the North Pole to Puerto Rico in a single giant network of air bases and communication facilities."

the appellee to sue in the District Court for the Middle District of Georgia and giving him the right to prosecute the suit to final execution and judgment.[4]

We find this theory wholly unconvincing. The venue provision of the Miller Act, requiring that suit be brought in the District where the contract was performed, was obviously not designed to favor Miller Act plaintiffs. Had Congress meant to make things easy for such plaintiffs, it would have provided them with a choice of forums in which to bring suit. As this Court noted in **Texas Construction Company v. United States**, 5 Cir., 236 F. 2d 138, at page 143:

> "... the requirement as to the district in which suit may be filed, contained in the Miller Act, is only one for the benefit of the defendants and may thus be waived by them, as may any other question of venue."

It seems clear, therefore, that the appellee will not be deprived of any substantial right if it is forced to comply with its voluntarily assumed obligation to arbitrate in New York City.

The Federal Employers' Liability Act[5] cases relied on by the appellee and the District Court are plainly inapposite to the case at hand. Section 6 of that Act permits an

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[4] The Miller Act provides:

"Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit." As amended Aug. 4, 1959, Pub. L. 86-135, § 1, 73 Stat. 279, 40 U. S. C. § 270b (b).

[5] 45 U. S. C., § 51.

injured employee to select any of three forms in which to press his claim. This provision was clearly and unmistakably enacted for the benefit of Liability Act plaintiffs. By providing a choice of three forums for the often impecunious workingman, Congress sought to assure that he would not be dissuaded or prevented from obtaining relief by the necessity of having to litigate his claim in an inconvenient forum. Thus, in **Boyd v. Grand Trunk Western Railroad Company**, 338 U. S. 263, the Supreme Court invalidated a contract provision restricting the plaintiff's choice of forums on the ground that:

> "... petitioner's right to bring this suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5 of the Liability Act: 'Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void. ...'"
>
> ...
>
> "The right to select the forum granted in § 6 is a substantial right. It would thwart the express purpose of the Federal Employers' Liability Act to sanction defeat of that right by the device at bar." 338 U. S. at pages 265, 266.

The Miller Act does not give a plaintiff the "right to select" his forum. Rather, it provides that the action must be commenced in the district where the contract was performed. This provision, as noted above, is for the benefit of the defendant, not the plaintiff, and the plaintiff is therefore not deprived of any substantial right if he is compelled to carry out his contract to litigate partially outside the district where the contract was performed.

Even apart from the question of venue, the District Court held that the Miller Act precluded arbitration,

wherever conducted, because it would negate appellee's right under the Act to press his claim in a court of law, and to "prosecute the suit to final execution and judgment." This theory must be rejected for essentially two reasons. First, there is absolutely nothing in the language or legislative history of the Miller Act which indicates that Congress meant to prohibit a laborer or materialman from voluntarily substituting the procedure of arbitration for his right to litigate in a federal court. On the other hand, the United States Arbitration Act expressly and unequivocally gave the parties the right to provide for arbitration of all disputes arising under their contracts. The District Court's decision, in effect, repeals the Arbitration Act as applied to Miller Act suits even though there is not the slightest indication anywhere that Congress meant this to be so.

Secondly, the appellee has not even attempted to demonstrate how or why he would be prejudiced by having this dispute settled by arbitration rather than in the federal courts. If it could be shown that disputes arising under the Miller Act involve complicated and sophisticated legal issues which cannot readily be resolved by arbitrators untrained in the law, we would perhaps be more willing to read into the Miller Act provision giving the appellee the right to sue in the federal courts a prohibition against having the dispute settled anywhere else. But such is not the case. This dispute involves nothing more than the rights and liabilities of two business concerns under ordinary business contracts. It is precisely the type of commercial dispute which is, and has always been thought to be, a proper subject for arbitration.

Indeed, the case most strongly relied on by the appellee demonstrates the fallacy in its argument. That case is **Wilko v. Swan**, 346 U. S. 427, where the Supreme Court held that an arbitration agreement could not prevent a

defrauded purchaser of securities from suing the selling under the provisions of the Securities Act of 1933. The rationale of that decision can be gleaned from the following quotation from the Court's opinion:

> "Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity **or the amount of money due under a contract is not the type of issue here involved.** This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or material fact cannot be examined." [Emphasis added.] 346 U. S. at 435-436.

Unlike the **Wilko** case, however, the instant case **does** involve "the amount of money due under a contract," the type of issue which the Court's opinion in Wilko indicates is properly referable to arbitration. Indeed, it is significant that, as an illustration of a case concerning "the amount of money due under a contract," the Supreme Court cited **Agostini v. United States**, 4 Cir., 142 F. 2d 854, where the Fourth Circuit held that a suit under the Miller Act could be stayed for arbitration proceedings.

Apart from the **Agostini** case, other cases indicating that arbitration is allowable in a Miller Act setting are **United States v. Bregman Construction Corp.**, 6 Cir., 256 F. 2d 851, and **United States v. Al-Con Development Corp.**, 4 Cir., 271 F. 2d 851.[6] Although the contention here urged was

[6] The appellee has not cited a case to the contrary.

not really analyzed in the above cited cases, apparently due to the failure of the plaintiffs therein to press the point that the Miller Act precluded arbitration, it is significant that the Court in the **Bregman** case stated flatly:

> "Without question, in a proper situation, the Arbitration Act applies in proceedings under the Miller Act." 256 F. 2d at 853.

Having concluded that the Miller Act did not preclude the appellant from proceeding with arbitration, one further point remains to be considered. As an additional reason for its decision the District Court stated:

> "Another reason why this action should not be stayed is that the suit seeks to cancel or rescind for fraud both of the subcontracts. Should that phase of the suit be successful the entire contracts would be rescinded, including the agreement for arbitration. Lytle v. Scottish American Company, 122 Ga. 458, 466."

Where a contract comes within the purview of the United States Arbitration Act, federal not state, law controls as to whether a claim of fraud precludes arbitration of a dispute arising under the contract. **Robert Lawrence Company v. Devonshire Fabrics**, 2 Cir., 271 F. 2d 402. Under federal law, arbitration is not barred by an assertion that the entire contract was induced by fraud; there must be a specific claim that the arbitration provision itself was fraudulently procured. **Robert Lawrence Company v. Devonshire Fabrics**, supra. Since the appellee did not specifically claim that the provision for arbitration was procured by the fraud of the appellant,[7] we hold that the

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[7] The appellee did not allege that he was induced to enter into the agreements for arbitration through the fraud of the appellant, but merely that the agreements were "maliciously inserted" in the contracts by the appellant in that, by providing for arbitration

District Court erred in concluding that the appellee's claim for rescission of the contracts on the ground of fraud was a bar to arbitration.

The judgment is Reversed and the cause Remanded to the District Court for further proceedings consistent with the views expressed in this opinion.

Rives, Circuit Judge, Dissenting:

I agree with the district court's appraisal of the intention of Congress with respect to the two Acts here involved. The Arbitration Act, enacted in 1925, is limited in its application to issues "referable to arbitration under an agreement . . . " 9 U. S. C. A., § 3. Ten years later the Miller Act was enacted in 1935 with the provision that suits of the type here involved shall be brought "in the United States District Court for any district in which the contract was to be performed and executed **and not elsewhere**" (emphasis supplied), 40 U. S. C. A., § 270b (b), and with its even more explicit provision that every person who has furnished labor or material and has not been paid therefor within ninety days "**shall have the right to sue** on such payment bond for the amount . . . . unpaid at the time of institution of such suit **and to prosecute said action to final execution and judgment** for the sum or sums justly due him. . . . " (Emphasis supplied.) Government contractors were restricted in the kinds of agreements into which they might validly enter to those conforming to the public policy declared in the Miller Act.

The Heard Act, which was the predecessor of the Miller Act had also been intended to protect those whose labor

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in New York City, the appellant sought to make it inconvenient and expensive for the appellee, a Georgia corporation, to get paid under the contracts. This is hardly a sufficient allegation of fraud in the inducement of the arbitration agreements to prevent arbitration in accordance with the agreements.

or material had contributed to the prosecution of the work on Government contracts. Under the Heard Act the Government was given the sole right to sue on the bond for six months after completion of the work and final settlement. Thereafter other claimants could sue but had to join in a single action. As we commented in **Texas Construction Company v. United States**, 5 Cir., 1956, 236 F. 2d 138, 143, "it thus became essential that the place of such action be considered as a strict condition of the bringing of the suit since the right of all creditors might be completely cut off unless those conditions were strictly complied with." If the Heard Act were still in force no one could seriously urge the validity of the present agreement which provides: "Any controversy or claim arising out of or relating to this agreement or the breach thereof . . . shall be settled by arbitration in the Borough of Manhattan, City and State of New York, in accordance with the Civil Practice Act of the State of New York."

The majority quotes from **Texas Construction Company v. United States**, supra, the following passage: ". . . the requirement as to the district in which suit may be filed, contained in the Miller Act, is only one for the benefit of the defendants and may thus be waived by them, as may any other question of venue."

In the **Texas Construction Company** case that language was employed in connection with the holding that a prime contractor and his bonding company when sued in a district other than that in which the contract was to be performed and executed may waive objection to the place of suit. In that context, the language employed does not mean that the requirement of the Miller Act that suit be brought "in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere" was intended for the benefit of the defendants **to the exclusion of the plaintiffs**; it means

no more than that the requirement relates to venue rather than jurisdiction and may be waived by **both parties.**

There is nothing in the language of the Act, or in its legislative history, which would restrict to the defendants the benefit of that requirement. The propriety of extending its protection to the plaintiffs is shown by the observation of the district court:

> "The instant case strikingly demonstrates the purpose of Congress in thus providing an exclusive venue, and, it is believed, an exclusive forum for the resolution of Miller Act disputes. The inherent inconvenience and injustice of Moseley's being forced to transport himself, his records, and his witnesses from the scene of the activities under investigation to a point so distant as New York City is from Macon, Georgia, is readily apparent."

The prime contractor is in peculiarly favorable position to impose upon those who would enter into subcontracts with him burdensome agreements as to arbitration. The number of subcontractors from which the prime contractor may choose is limited only by the scope of the industry, while would-be subcontractors must seek the nod of a single prime contractor, who is in that respect a complete monopolist.

If, as must be conceded, the Heard Act protected those persons supplying the contractor with labor and materials against the imposition of such burdensome agreements, then, a fortiori, the Miller Act does no less. In **MacEvoy Co. v. United States**, 1944, 322 U. S. 102, 105, 106, the Supreme Court said:

> "The Miller Act, while it repealed the Heard Act, reinstated its basic provisions and was designed primarily to eliminate certain procedural limitations on

its beneficiaries. There was no expressed purpos in the legislative history to restrict in any way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond."

United States v. Aetna Casualty & Surety Co., 2d Cir., 1962, 297 F. 2d 665, at page 667 points out:

"Every subcontractor and materialman not reimbursed for work done under a contract is given **an unqualified right to sue on the payment bond.**" (Emphasis supplied.)

In discussing the changes made between the Heard Act and the Miller Act, the court said, pages 668-669:

"The primary aim of the Miller Act was to secure greater protection for the subcontractor. The major changes were designed to streamline the cumbersome Heard Act machinery and to facilitate suit by those supplying labor or materials to the general contractor.

". . . The purpose of the Miller Act was clearly to provide a forum for all unpaid subcontractors." (Emphasis supplied.)

The court found such a strong public policy in favor of the protection of subcontractors and the furnishing of a forum in which they may proceed in court to enforce their right to prompt payment that it rightly concluded that, although the work was done outside the United States, and therefore was not within any judicial district, an unpaid subcontractor was nevertheless entitled to maintain his suit.

In this connection, the language which the court used on page 669 is most appropriate to the situation the plain-

tiff in this case would face if he were not permitted to prosecute his suit, when the court said:

> ". . . . with no forum for enforcement, the bond becomes an empty gesture, a stately farce carried out by contractors and sureties, at the public expense, and to the detriment of the very class the Miller Act was designed to protect. We cannot accept a construction which would lead to such a result."

The Miller Act provides to every person who has furnished labor or material not only the right to sue in the district in which the contract was to be performed and executed, but also the "right . . . . to prosecute said action to final execution and judgment." (Emphasis supplied.) That is diametrically opposite to being required to stay the action to await the result of an arbitration.

The holding of the majority in the present case places it within the power of prime contractors to insist on agreements for arbitration which might well nigh nullify the beneficent provisions of the Miller Act. That is not conducive to the efficient, economical and just performance of Government contracts. So thinking, I respectfully dissent.

A true copy.

Test:

Edward W. Wadsworth,
Clerk, U. S. Court of Appeals, Fifth Circuit,

By Clara R. James,
Deputy.

(Seal)

New Orleans, Louisiana, Jn 27 1962.

PROVISIONS OF THE UNITED STATES ARBITRATION ACT.

As set out in 9 U. S. C., Secs. 1, 2 and 3.

1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.